



KDHE's ENVIRONMENTAL USE CONTROL PROGRAM

Introduction

The Environmental Use Control Program was established by Kansas Statute (K.S.A. 65-1,221 to 65-1,235) on July 1, 2003. The purpose of this program is to provide a voluntary mechanism to assist existing state cleanup or remedial programs in addressing environmental contamination in a cost-effective manner that is protective of human health and the environment.

Environmental Use Controls (EUCs), also referred to as institutional controls, are a legal means of restricting or prohibiting human activity and property use to prevent or reduce exposure to contamination. Some examples of EUCs include: preventing disturbance of soil caps, covers, or berms; prohibiting the drilling of water wells for domestic or other purposes; restricting and/or providing notification during excavation on a property; restricting use of a property to only non-residential purposes; and restricting access to a property.

History and Purpose

On April 21, 2003, Governor Kathleen Sebelius signed House Bill 2247. This bill established the use of EUCs for property with environmental contamination above unrestricted (i.e., residential) use standards. The bill was developed by KDHE in coordination with a broad stakeholder committee representing state and local government, military interests, agricultural and petroleum industries, major utilities, railroads, and environmental special interest groups. The bill was introduced during the 2003 Legislative session and was subsequently passed by the House with a vote count of 111 to 12, and by the Senate with a vote count of 34 to 0. House Bill 2247, known as the Environmental Use Control Act, became law on July 1, 2003. The following definition is provided in K.S.A. 65-1,222:



Due to the magnitude of impact and extent of contamination at some sites, decontamination may not be feasible or cost effective. An overwhelming volume of heavy metal contaminated waste is present at this former smelter site in Allen County.

“Environmental Use Control” means an institutional or administrative control, a restriction, prohibition or control of one or more uses of, or activities on, a specific property, as requested by the property owner at the time of issuance, to insure future protection of public health and the environment when environmental contamination which exceeds the department standards for unrestricted use remains on the property following the appropriate assessment and/or remedial activities as directed by the department pursuant to the



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secretary's authority. For the purposes of this act, "environmental contamination" does not mean animal or process waste from a confined feeding facility as defined in K.S.A. 65-171d, and amendments thereto, livestock operations or the application of livestock waste for use as a plant nutrient. Any environmental use control created pursuant to this act runs with the property and is binding on the owner and subsequent owners, lessees, and other users of the land.

KDHE staff, with input from the stakeholder committee, drafted proposed regulations for the Environmental Use Control Program. While the promulgated statute created the EUC Act and provides sufficient detail to implement the EUC program, the regulations will provide additional definition for some aspects of the program such as the application process, financial assurance, and long term care agreements. As of February 2005, the draft regulations are in the concurrence process. They are likely to be finalized as K.A.R. 28-73-1 through 28-73-7 by the end of 2005; however, the EUC program is fully operational at this time.



Stabilization and capping of smelter waste will be protective of human health and the environment. Environmental Use Controls on this property ensure proper maintenance of the cap, facilitate KDHE inspections, and prevent future property uses that may result in inadvertent exposure to waste remaining onsite.

The purpose of the EUC Act is to allow a property owner to voluntarily restrict the use of their property in order to mitigate risk posed by residual environmental contamination, at concentrations exceeding KDHE standards for unrestricted residential use, remaining on the property after appropriate assessment and or remedial activities. EUCs provide property owners and developers with a method of potentially limiting or reducing the amount of remediation performed at a site while still remaining protective of human health and the environment. This is accomplished by establishing limits on the future use of the property. Limiting the future use allows the remedial standards for that property to be based on the actual future use of the property, rather than requiring cleanup standards to be based on unrestricted, residential use. EUCs can be an effective component of the remedial alternative for sites where: 1) it is not technically or

economically feasible to remove residual contamination that exceeds unrestricted use standards; and 2) restricting access to or activities on the property is a viable option for reducing potential exposure to contamination. There are many impacted properties across Kansas where remediation to unrestricted use standards is not practicable due to a variety of technical or economic considerations. The risk from these impacted properties can be dramatically decreased or removed through the use of engineering controls and/or appropriate use restrictions to prevent or limit exposure to residual contamination.



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Benefits

KDHE anticipates several long term benefits from the EUC Act including: 1) increased protection of human health and the environment through tracking and enforcement of land use restrictions; 2) increased selection of more affordable remedies based on future land use; 3) redevelopment and beneficial reuse of previously contaminated property for industrial and commercial use; and 4) restoration of economic vitality in Kansas communities. The benefits of the EUC program will be realized by a wide spectrum of parties, including: the public, landowners, potential purchasers, construction or utility workers, and the local communities and government entities.

EUCs protect the public by making sure that restrictions, designed to prevent people from coming into contact with contamination, are enforced. Prior to the EUC Act, KDHE allowed some sites to be remediated to non-residential standards by requiring the company or landowner to place restrictions on the deed of the property; however, there was no formal means for monitoring these sites to ensure that the property was in compliance with the restrictions and no means of legally ensuring that subsequent property owners were adequately informed and compliant with the restrictions. This approach did not provide adequate management of potential risk in most cases and, subsequently, KDHE was less likely to approve non-residential clean-up standards. The EUC Act provides a mechanism for tracking and enforcing restrictions on property use, and in essence provides a safety net when cleanup standards contingent on restricted use of a property are approved by KDHE.



Engineered structures and caps should be designed to withstand the tests of time.

EUCs can be beneficial to landowners in several ways. EUCs may provide cost savings to land owners by restricting access or use of the property rather than remediating to unrestricted use standards. EUCs may also protect landowners by preventing damage to caps or engineered barriers by restricting activities in these areas, which can prevent costly repairs or additional remedial actions required to re-address the contamination. By providing a means for mitigating risk from residual contamination, EUCs may also reduce a landowner's environmental liability.

EUCs protect potential purchasers by disclosing contamination and restrictions on the property deed. These restrictions transfer with property ownership and are binding on all subsequent owners, lessees, and other users of the property. Once applied, EUCs cannot be removed from a deed without KDHE's approval; therefore, purchasers are protected from buying use-restricted property without prior knowledge of the environmental conditions.



Construction and utility workers are protected by EUCs that prohibit or require prior notification before excavating, moving soil, or penetrating a cap where residual contamination is left in place.

Documenting and tracking properties with EUCs will help protect local governmental entities interested in acquiring property by making them aware of environmental conditions or restrictions prior to acquiring it. By allowing landowners or companies to remediate to concentrations suitable for the future use of a property, the EUC program encourages redevelopment of previously blighted areas. This would potentially be beneficial for economic redevelopment and could ultimately result in an increased tax base for local communities and promote the creation of jobs.

Eligibility

The EUC program is a voluntary program, meaning that public and private entities may elect to participate in the program by submitting an application. EUCs are applicable and necessary at a site if residual contamination (i.e., contamination remaining on the property following clean-up) exceeds concentrations established by KDHE as acceptable for unrestricted or residential property use. A landowner/responsible party has the option of remediating residual contamination on their property to residential standards or applying for an EUC to leave the residual contamination in place.

To be eligible to receive an EUC, the site must be active (or has been active) in a KDHE program with oversight authority such as the VCPRP or the State Cooperative Program. While EUCs can be approved for an eligible site at any point during the investigative or remedial process, they must be applied as part of the overall approved clean-up plan. EUCs cannot be used as a default remedy in lieu of evaluating active remedial alternatives and are not to be used as a substitute for remedial actions that are otherwise technically and economically practicable. EUCs may be appropriate for a property if the clean-up objectives are based on or include: non-residential land use; protective structures (i.e., engineered barriers such as caps, berms, surface controls, etc.); or prohibiting activities on the property (i.e., no water wells, no excavation or trenching, etc.).

How EUCs Work

Contamination at a property can be cleaned up to residential standards to achieve closure, or EUCs may be used as part of the cleanup to allow closure conditioned upon restrictions that prevent exposure to residual contamination. Entities who elect to participate in the program will be subject to the promulgated statutes and the pertinent regulations when they are finalized. An EUC runs with the property and is binding on all subsequent owners, lessees, and other users of the property. EUCs can be applied to a property in perpetuity or for a specified term of years. If applied for a term, the landowner and KDHE will reassess the residual contamination on the property at the landowner's expense upon completion of that term. Based on this assessment, which may require collection and analysis of soil or ground water samples, KDHE will either determine a new duration term for the EUC or agree to terminate the EUC. Once applied, EUCs remain attached to the property deed until legally rescinded by KDHE. A property owner can elect to conduct additional investigative or remedial activities on their property after an EUC is in place in an attempt to remove or modify the



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EUC on their property. Coordination of such actions with KDHE is strongly recommended. An EUC shall be rescinded by KDHE if the property owner demonstrates to the department's satisfaction that the original risk to human health or the environment, which created the need for the control, is no longer present.

Application

An application to participate in the EUC program is included in this section and additional copies can be downloaded from the KDHE website at www.kdhe.state.ks.us/remedial/eucs.htm or requested by phone at 785-296-1935. The application for an EUC must be submitted by the property owner or the owner's authorized representative. Each application includes instructions for completing the forms and KDHE is available to answer questions concerning the application, if necessary. KDHE will process submitted applications within 60 days to determine if the property is eligible for the establishment of EUCs. There is no fee for submitting an application.



Waste repository caps should promote drainage and minimize erosion or abrasion of the final cover.

Categories

Using information submitted in the application and obtained from site files, KDHE will determine whether the property is eligible for the establishment of EUCs and, if so, whether the property will be classified as a Category 1, 2 or 3 property. Category determinations are based on the size of the property, the toxicity and mobility of the residual contamination left on site, and the necessary inspection frequency. The criteria used to establish and define each category is listed below:

Category 1:

- ≤ 5 acres in size
- Residual contamination has low toxicity and low mobility
- Minimal anticipated maintenance of protective structures
- Inspection frequency - once every 5 years

Category 2:

- Any size property
- Residual contamination has moderate toxicity and/or moderate mobility
- Limited anticipated maintenance of protective structures
- More complicated or costly inspections
- Inspection frequency - not more than one inspection per year

Category 3:

- Any size property, especially large tracts
- Residual contamination has moderate to high toxicity and/or moderate to high mobility
- Complicated or extensive maintenance or monitoring of protective structures
- Frequent or complicated site inspections anticipated
- Inspection frequency - one or more inspections per year
- Cost of inspections may be dependent on the future use of the property and the quality of maintenance of protective structures by the property owner

The following table is used for the purpose of defining toxicity with regards to determining whether a property will be classified as a Category 1, 2, or 3 property. Properties with both carcinogenic and non-carcinogenic compounds present will be classified by the more conservative category.

| TOXICITY | CARCINOGENIC | NON-CARCINOGENIC |
|-----------------|--|--|
| Low | > RSK Residential < RSK Non-Residential | > RSK Residential < RSK Non-Residential |
| Moderate | > RSK Non-Residential < 1×10^{-4} Risk | > Hazard Index = 1 |
| High | > 1×10^{-4} Risk | > Hazard Index = 1 |

Contaminant mobility, for the purpose of determining property category, will be determined by the department on a case-by-case basis because there is too much variability to develop a template to cover all scenarios. Considerations will include, but are not limited to: the physical state or phase of the contamination, physico-chemical properties of the contamination, and the geology and hydrology of the property setting. For any property where ground water has been impacted by contamination or where ground water monitoring is required due to the potential for impacts, mobility will be classified as moderate or high.



This orphan site in Montgomery County, Kansas, the former Standard Asphalt & Rubber Company (SARCO) site, was heavily impacted by acidic sludge generated from asphalt refining in the early 1900s.

Costs

The landowner's cost for an EUC is based on the category designation assigned to it. Category 1 properties require a one-time payment of \$2,000 by the applicant to fund the life of the EUC. Category 2 properties require a one-time payment by the applicant, not to exceed \$10,000 to fund the life of the EUC. Costs for Category 3 properties can vary depending on nature of the EUC, monitoring and inspection frequencies, maintenance requirements for protective structures, etc.



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Category 3 properties will require a Long Term Care (LTC) Agreement to establish the costs for the EUC. The LTC Agreement will document the responsibilities of each party and include provisions to reimburse the department for costs that will be incurred by performing inspections, tracking of the property, and long term care. In some cases, KDHE may require the applicant to provide and maintain financial assurance for a Category 3 EUC based on the potential for long term maintenance costs of protective structures and the potential for release or migration of environmental contamination from the property in the future.

There are several acceptable methods for demonstrating financial assurance at a Category 3 property with EUCs, including: Environmental Insurance; a Guarantee; a Performance or other Surety Bond; an Irrevocable Letter of Credit; or Qualification as a Self-Insurer. Some of these methods will also require a standby trust. At the time of this printing, the guidance document discussing procedures for demonstrating Financial Assurance for EUC properties is being developed. KDHE anticipates that the final document will be generated by the end of 2005 in conjunction with the final EUC regulations.



The cleanup remedy involved stabilization of the sludge materials using cement kiln dust to immobilize the contaminant.

Implementation

Upon approval of an application, KDHE will generate an EUC Agreement (EUCA) that sets forth the restrictions, prohibitions, and limitations to be applied to the property. The agreement also describes the funding means and amount, the duration of the EUC, the monitoring, inspection, and maintenance requirements, and any other necessary terms and conditions of the EUC. Upon receipt of the executed EUCA from KDHE, the applicant must sign and notarize the document, and file the agreement with the County Register of Deeds in the county in which the property is located. The applicant must submit a notarized copy of the filed EUCA bearing the stamp or seal of the County Register of Deeds to KDHE within ninety days from certified receipt of the executed Agreement from KDHE.

The EUC funding for a Category 1 or 2 property, or the executed LTC Agreement and initial payment for a Category 3 property must also be submitted to KDHE within ninety days of receipt of the EUCA.



An EUCA is not effective until proper signing and recording of all necessary documents and submission of required funding to KDHE is complete.

Once the EUCA is finalized, KDHE will enter the pertinent information into the department's EUC tracking system. Inspections will be performed at the required frequency by the landowner and/or KDHE, as specified in the agreement. An inspection form documenting the conditions of the property shall be submitted to KDHE after each inspection. These inspection forms may be either property-specific or a standardized form generated by KDHE, depending on the level of detail necessary to adequately document property conditions. If the inspection reveals that the property is out of compliance with the terms of the EUC (i.e., required signage is removed, surface erosion of a soil cap, etc.), KDHE will request that the owner perform the necessary actions to return the property to compliance. The landowner shall submit documentation to KDHE recording all actions taken to correct the deficiencies. If the terms of the EUCA are not being implemented by the property owner, or the property presents a hazard to public health and the environment, KDHE may take such action as authorized by K.S.A. 65-1,229, including: 1) issuing an order directing the owner to correct any deficiencies and fully implement the terms of the EUCA, 2) issuing an order retracting the EUCA and requiring the owner to implement a remedial action at the property to attain clean-up standards for unrestricted or residential use of the property, or 3) for Category 3 sites, KDHE may commence an action enjoining acts or practices set forth in the agreement or request that the attorney general or appropriate district or county attorney commence such an action.



Controls established at the SARCO site include long term maintenance of the cap and restrictions on installation of water wells, subsurface excavation activities, and use of the property for residential purposes.

For additional information about the Environmental Use Control Program, please contact:

Christine Jump, Unit Chief
Post-Remediation-EUC Unit
Kansas Dept. Health and Environment
1000 SW Jackson Street, Suite 410
Topeka, Kansas 66612-1367
cjump@kdhe.state.ks.us

or

Rick Bean, Section Chief
Remedial Section
Kansas Dept. Health and Environment
1000 SW Jackson Street, Suite 410
Topeka, Kansas 66612-1367
rbean@kdhe.state.ks.us

785-296-1935

785-296-1675



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KANSAS VOLUNTARY CLEANUP AND PROPERTY REDEVELOPMENT PROGRAM



KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT BUREAU OF ENVIRONMENTAL REMEDIATION



ENVIRONMENTAL USE CONTROL PROGRAM

--APPLICATION TO PARTICIPATE--

INTRODUCTION

Effective July 1, 2003, the State of Kansas promulgated a statute establishing ***Environmental Use Controls***, K.S.A. 65-1,221, *et seq.*, to address environmental contamination in a cost effective manner that is protective of human health and environment. This application package (application form and instructions) provides the mechanism for land owners and other eligible parties to apply for Environmental Use Controls.

APPLICATION AND INFORMATION SUBMITTED

The completed application is a request by the applicant to voluntarily restrict the use of a property in order to protect the public health and environment from known contamination which exceeds department standards for unrestricted residential use. The application and information on file at KDHE will be used by KDHE to determine if a property is eligible for Environmental Use Controls.

WHERE TO SEND APPLICATION

Send completed application and supporting information to:

Environmental Use Control Program
Remedial Section
Kansas Department of Health and Environment
Bureau of Environmental Remediation
1000 SW Jackson, Suite 410
Topeka, Kansas 66612-1367

KDHE REVIEW AND RESPONSE TO AN APPLICATION

KDHE has **60 days** from receipt of a complete application to determine if a property is eligible for the establishment of Environmental Use Controls. Incomplete applications may be returned to the applicant with specific identification of incomplete items. The applicant has 30 days to submit a revised and/or completed application to KDHE. If the application is complete upon resubmittal, KDHE will finish its review and provide the eligibility determination to the applicant. **It is very important to ensure an application is completed in accordance with the instructions the first time!**

QUESTIONS ON ELIGIBILITY AND/OR COMPLETING THE APPLICATION

Call Christine Jump, Environmental Use Control Coordinator at (785)296-1935, or Rick Bean, Section Chief, Remedial Section at (785)296-1675.



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KANSAS VOLUNTARY CLEANUP AND PROPERTY REDEVELOPMENT PROGRAM

APPLICATION INSTRUCTIONS

SECTION I. PROPERTY INFORMATION

| | |
|-----------------------|---|
| Name of Site | Provide the name of the site. The site name is the name that has been used to identify the site in previous correspondence, agreements, orders, etc. |
| Property Location | Provide a street address of the property. Also include the legal description of the property and/or a tax lot number, if one exists, which identifies the property. Tax lot numbers may be obtained from the city or county tax appraiser's office. |
| Legal Survey | A legal survey or accurate legal description of the property or portion of the property subject to the application must be included in the application package. If the exact portion of the property to be restricted cannot be determined at the time of application a more general site map indicating the approximate location of the applicable portion of the property should be included in the application package, with the understanding that a legal survey identifying the exact portion of the property will be required prior to implementing the Environmental Use Control. |
| Current Use | Describe the current activities at the property. For example: "no current activities" or "parking lot". |
| Future Use | If known, describe the intended future use of the property. |
| Surrounding Land Use | Check all boxes describing the land use in the area surrounding and immediately adjacent to the property. If the adjacent properties have several different land uses a map may be necessary to document the surrounding land usage. |
| Current Zoning | Provide the current zoning of the property. |
| Zoning Responsibility | Identify the local government entity responsible for zoning the property. |

SECTION II. APPLICANT INFORMATION

| | |
|----------------------|---|
| Applicant | The individual, trust, firm, joint stock company, public or private cooperation, limited liability company or partnership, government, or other organization that is applying for an Environmental Use Control. |
| Applicant Contact | Provide the name of the person making application for an Environmental Use Control. The applicant contact can be the owner of the property or the owner's legal representative. The applicant contact can also be a representative with legal authority for a trust, firm, joint stock company, public or private cooperation, limited liability company or partnership, government, or other organization that is applying for an Environmental Use Control. |
| Contact Information | Provide the applicant contact's mailing address and direct telephone number; include a fax number and email address if available. |
| Applicant's Interest | If the applicant is not the owner of the property, the applicant must provide notarized authorization from the property owner to apply for the Environmental Use Control. The authorization should include the owner's name and contact information, the applicant's name and contact information, a brief description of the proposed Environmental Use Control, and the owner's signature verifying their authorization of the proposed Environmental Use Control to be placed on their property. |
| Owner Information | As stated on the application form, if the applicant is not the owner of the property, identify the property owner and provide the requested information. |



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APPLICATION INSTRUCTIONS

SECTION III.

NATURE OF POTENTIAL CONTAMINATION

| | |
|-------------------------|--|
| Identified Contaminants | Check the appropriate boxes for all categories of contaminants that have been identified at the property. Check the "Other" box and list any other contaminants identified on the property for which descriptors are not provided. |
| Media Contaminated | Indicate the contaminated environmental media at the property. |
| Reference Documents | Reference any relevant reports, decision documents, studies, plans, etc. in order to provide the department with a list of documents that fully describes the environmental status of the property. |
| KDHE Cleanup Program | Check the appropriate box to indicate the KDHE program through which the contamination on the property is being addressed. |
| Description of Remedy | Provide a brief description of the proposed remedy for the contamination at the property. The description should include any planned, ongoing, or completed remediation at the property and how the Environmental Use Control will be used as part of the remedy. |
| Contaminant Levels | Check the appropriate box to indicate if contaminant levels on the property have been or will be left at levels above residential limits for unrestricted use at the completion of the proposed remedy. An Environmental Use Control may not be necessary if the property will be remediated to levels that allow unrestricted residential use. |

SECTION IV.

REQUESTED RESTRICTIONS/REQUIREMENTS/FREQUENCY

| | |
|---------------------------------|---|
| Requested Restrictions | Check the appropriate boxes for all restrictions that the applicant is volunteering to place on the property. Check the "Other" box and list any other requested restrictions for which descriptors are not provided. The restrictions applied to the property will be specified in a property specific Environmental Use Control Agreement after the application has been approved by the department. |
| Post-Remediation Requirements | Check the appropriate boxes for all the requirements necessary to maintain the requested restrictions. Check the "Other" box and list any other applicable requirements for which descriptors are not provided. |
| Monitoring/Inspection Frequency | Check the appropriate box for the anticipated monitoring or inspection frequency necessary for ensuring the requested restrictions are being maintained. Check the "Other" box and list any other anticipated monitoring or inspection frequencies if that frequency is not provided. |
| Inspection Access | Verify that KDHE will be allowed access to the property for the purpose of inspecting the property to ensure the requested restrictions are being maintained. The application will be approved only if KDHE is allowed access to the property. |
| Funding | In accordance with H.B. 2247, the applicant shall provide funding to the department for inspecting, administering, and tracking the Environmental Use Control for the property. The amount of funding required is based upon the property size, contaminant mobility/toxicity, maintenance requirements, and inspection frequency and will be determined by the department after review and approval of the application. After approval of the application, KDHE will either request a one-time payment that will not exceed \$10,000 or a long-term care agreement will be negotiated to provide the necessary funding. No money is required with the initial submittal of the application. Please check the appropriate box to indicate the preferred payment schedule. |

SECTION V.

APPLICATION TO PARTICIPATE TERMS/APPLICATION SIGNATURE

| | |
|-----------------------|--|
| Participation Terms | Environmental Use Controls can only be applied to a property after adequate characterization and remediation, and only when it has been demonstrated to KDHE's satisfaction that the application of an Environmental Use Control will provide for protection of public health and the environment. There are certain considerations that may preclude KDHE's approval of an Environmental Use Control including, but not limited to, inadequate characterization, identified sensitive receptors, extremely toxic and/or mobile contaminants, or excessively elevated concentrations of contaminants, etc. |
| Application Signature | The Applicant Contact as defined in Section II must sign the application. |



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KANSAS VOLUNTARY CLEANUP AND PROPERTY REDEVELOPMENT PROGRAM



KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT BUREAU OF ENVIRONMENTAL REMEDIATION



Application for an ENVIRONMENTAL USE CONTROL for property located in the State of Kansas

Application Form Instructions: Please type or print legibly. Incomplete applications may be returned to the applicant. If any of the information requested is not applicable, please enter "NA" in the blank.

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SECTION I. PROPERTY INFORMATION

Name of Site: _____

Property Address: _____

City (or Township): _____ County: _____ Zip Code: _____

Township _____ South Range _____ (E/W) Section _____ Quarter(s) _____

Tax Lot # _____ Property Size (in acres) _____

Has a legal survey been conducted on the portion of property subject to this application?

☐ Yes ☐ No

Please include a copy of the legal survey and a map that clearly depicts the property boundaries.

Current use of property: _____

Future use of property (if known): _____

Land use surrounding property (check most applicable description or combination of descriptions):

☐ Residential ☐ Industrial ☐ Commercial ☐ Agricultural ☐ Other (explain) _____

Current zoning of property: _____

Local governmental entity responsible for zoning this property: _____

SECTION II. APPLICANT INFORMATION

Applicant: _____

Applicant Contact: _____ Title: _____

Mailing Address: _____

City: _____ State: _____ Zip Code: _____

Telephone: (____) _____ Fax: (____) _____ Email: _____

Applicant's interest in or relation to property (check all that apply):

☐ Owner of property

☐ Entity with written authorization from the owner

***Please attach a notarized letter of authorization for EUC application from the owner.**

If Applicant is not the owner of the property, provide the following information:

Owner's Name: _____ Organization: _____

Owner's Mailing Address: _____

City: _____ State: _____ Zip Code: _____

Telephone: (____) _____ Fax: (____) _____



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Kansas Department of Health and Environment/Bureau of Environmental Remediation APPLICATION FOR AN ENVIRONMENTAL USE CONTROL

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SECTION III. DESCRIPTION OF CONTAMINATION

Contaminant Type identified at the property (check all that you are aware of):

- | | | |
|--|--|---------------------------------|
| <input type="checkbox"/> Solvents/degreasers | <input type="checkbox"/> Pesticides (herbicides, insecticides, etc.) | <input type="checkbox"/> Metals |
| <input type="checkbox"/> Petroleum products | <input type="checkbox"/> Inorganics (salt, soda ash, etc.) | <input type="checkbox"/> PCBs |
| <input type="checkbox"/> Acids/bases | <input type="checkbox"/> Fertilizer (nitrate, ammonia) | <input type="checkbox"/> Sludge |
| <input type="checkbox"/> Paint/paint wastes | <input type="checkbox"/> Other (list) _____ | |

Contaminated media on property:

- ☐ Surface Soil ☐ Subsurface Soil ☐ Ground Water ☐ Surface Water ☐ Sediments

Please reference any relevant documents that will provide the department with a detailed description of the contamination and the proposed remedy. Attach a listing of additional references if necessary.

Title/Date: _____

Title/Date: _____

Title/Date: _____

Identify the KDHE Cleanup Program currently addressing the property:

- ☐ State Cooperative ☐ Voluntary Cleanup ☐ Brownfields ☐ State Water Plan
☐ Dry Cleaner Trust Fund ☐ Above/Underground Storage Tank ☐ RCRA
☐ Other: _____

Please describe the proposed remedy for the property: _____

Will contamination be left on the subject property at concentrations above levels allowing unrestricted residential use following a KDHE approved remediation? ☐ Yes ☐ No

INTERNAL USE ONLY

Project Code: _____

VCP Agreement Number: _____

KDHE Project Manager: _____

Consent Order Number: _____

Bureau/Section: _____



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KANSAS VOLUNTARY CLEANUP AND PROPERTY REDEVELOPMENT PROGRAM

Kansas Department of Health and Environment/Bureau of Environmental Remediation APPLICATION FOR AN ENVIRONMENTAL USE CONTROL

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SECTION IV. REQUESTED RESTRICTIONS/REQUIREMENTS/FREQUENCY

REQUESTED RESTRICTIONS:

Please check all that apply:

- ☐ Restrict excavation, dredging, construction or digging activities.
- ☐ Restrict drilling or using water wells for domestic or other purposes.
- ☐ Restrict or limit access to property.
- ☐ Restrict land use.
- ☐ Restrict the type of plant growth or vegetative cover.
- ☐ Other Restrictions - Please specify: _____

Please note the restrictions applied for in this application will be specified in a property-specific Environmental Use Control Agreement approved by the department and filed with the Register of Deeds in the county where the subject property is located.

POST-REMEDATION REQUIREMENTS:

Please check all that apply:

- ☐ Posting notices, maintaining postings.
- ☐ Ground water monitoring.
- ☐ Protective structure maintenance (patching, erosional control, regrading, etc.).
- ☐ Vegetative maintenance (mowing, watering, planting, etc.).
- ☐ Fence maintenance.
- ☐ Other Requirements - Please specify: _____

PROPOSED MONITORING/INSPECTION FREQUENCY:

Please check one:

- ☐ One inspection every five years.
- ☐ Two inspections per year.
- ☐ Other - Please specify: _____
- ☐ One inspection per year.
- ☐ Four inspections per year.

Upon approval of an Environmental Use Control Agreement, does the applicant agree to allow access to KDHE personnel or contractors for the purpose of inspecting the property to ensure the requested restrictions are being maintained?

☐ Yes ☐ No*

*Please note this application will not be approved if the response to this question is "NO."

Please indicate the preferred payment schedule for the proposed Environmental Use Control?

- ☐ One-time payment
- ☐ Long Term Care Agreement (The agreement will specify the amount and frequency of payment).



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SECTION V. APPLICATION TO PARTICIPATE TERMS/APPLICATION SIGNATURE

The undersigned has voluntarily applied to the Kansas Department of Health and Environment (KDHE)/Bureau of Environmental Remediation (BER) to restrict the use of, or activities on the property defined in this application due to residual contamination remaining on the subject property above regulatory limits for unrestricted "residential" use. The undersigned agrees that based on this application the KDHE shall issue an Environmental Use Control Agreement to restrict specific use of, or activities on the subject property. The Environmental Use Control Agreement will contain property-specific restrictions identified in this application as approved by the department, inspection frequencies, access provisions, maintenance requirements, funding requirements and any other requirements associated with this application. The applicant agrees to register an approved, notarized Environmental Use Control Agreement with the Register of Deeds in the county where the property is located.

BER shall determine, and notify the undersigned accordingly, if the subject property is eligible for an Environmental Use Control. If the subject property is determined eligible, the undersigned shall sign an Environmental Use Control Agreement describing the voluntary restrictions requested by the applicant, register the Environmental Use Control Agreement with the Register of Deeds, and submit a notarized copy to the KDHE within 90 days of KDHE approval of this application.

Execution of this application form does not constitute an Environmental Use Control, and the undersigned shall not be bound to proceed with the voluntary restrictions. By completing and signing this application, the undersigned does not admit or assume liability for contamination at the property. The undersigned may terminate this application at any time by notifying BER.

The application should be submitted to : Environmental Use Control Program
Remedial Section
Kansas Department of Health and Environment
Bureau of Environmental Remediation
1000 SW Jackson, Suite 410
Topeka, Kansas 66612-1367

Name: _____ (print or type) Title: _____

Signature: _____ Date: _____



SECTION 19

Environmental Use Controls
K.S.A. (2004 Supp.) 65-1,221 through 65-1,235

ENVIRONMENTAL USE CONTROLS

65-1,221. Intent. The intent of this act is to provide a voluntary mechanism to assist existing state programs to address environmental contamination in a cost effective manner that is protective of human health and the environment.

History: L. 2003, ch. 130, 1; July 1.

65-1,222. Definitions. As used in this act:

(a) "Department" means the Kansas department of health and environment.

(b) "Environmental use control" means an institutional or administrative control, a restriction, prohibition or control of one or more uses of, or activities on, a specific property, as requested by the property owner at the time of issuance, to ensure future protection of public health and the environment when environmental contamination which exceeds department standards for unrestricted use remains on the property following the appropriate assessment and/or remedial activities as directed by the department pursuant to the secretary's authority. For the purposes of this act, "environmental contamination" does not mean animal or process waste from a confined feeding facility as defined in K.S.A. 65-171d, and amendments thereto, livestock operations or the application of livestock waste for use as a plant nutrient. Any environmental use control created pursuant to this act runs with the property and is binding on the owner and subsequent owners, lessees and other users of the land.

(c) "Owner" means any owner of record of property, and any person or entity with written authorization from the owner to make decisions regarding the transfer of the subject property or placement of encumbrances on the subject property, other than by the exercise of eminent domain.

(d) "Person" means any individual, trust, firm, joint stock company, public or private corporation, limited liability company or partnership; the federal government or any agency or instrumentality thereof; any state, or any agency, instrumentality or political or taxing subdivision thereof; or any interstate body.

(e) "Protective structure" means an engineered physical structure implemented as part of the remedial action to control or respond to a release or threat of release of environmental contamination. Protective structure includes capping, fencing, berming, diking, drainage structures and other structures that may control migration or other releases of environmental contamination.

(f) "Property" means real property.

(g) "Remedial activity" means any site cleanup, soil or groundwater monitoring associated with a contaminated property, remedial action, corrective action, emergency

action, removal action or other action necessary or appropriate to respond to a release or threat of release of environmental contamination.

(h) "Secretary" means the secretary of health and environment.

History: L. 2003, ch. 130, 2; July 1.

65-1,223. Exclusions from act. (a) The provisions of this act, except the provisions of subsection (b) of K.S.A. 2004 Supp. 65-2,230, and amendments thereto, shall not apply to solid waste disposal areas which are issued permits pursuant to K.S.A. 65-3407, and amendments thereto, or which receive authorization from the secretary for unpermitted disposal pursuant to K.S.A. 65-3407c, and amendments thereto, provided that the owner of each such solid waste disposal area establishes environmental use controls for the area, subject to approval by the department, by executing and filing a restrictive covenant on the property deed.

(b) The provisions of this act shall not apply to confined feeding facilities as defined in K.S.A. 65-171d, and amendments thereto.

History: L. 2003, ch. 130, 3; July 1.

65-1,224. Environmental use control; application; requirements; approval or disapproval. (a) An owner of property, with departmental approval, may restrict the use of the owner's property to mitigate the risk posed to human health and the environment by imposing on the property an appropriate environmental use control.

(b) (1) If the owner elects to voluntarily restrict use of or activities on the owner's property, the owner or the owner's authorized representative shall make application to the department for approval of an environmental use control. Such application shall be made on forms provided by the department and shall be completed and submitted to the department by the owner or the owner's authorized representative.

(2) Department approval of an application shall be subject to the application's containing the following components: Appropriate restrictions to protect public health and the environment from known contamination which exceeds department standards for unrestricted residential use; access to the subject property; an inspection schedule that is appropriate to monitor conditions at the subject property; and the availability of funds to administer the provisions of this act related to the subject property.

(3) The department may require the applicant to provide financial assurance for category 3 property as described in subsection (c)(3) of K.S.A. 2004 Supp. 65-1,226, and amendments thereto, based on the potential for long term maintenance cost of protective structures and the potential for release or migration of environmental contamination from the property. The applicant shall provide the financial assurance by one or more methods satisfactory to the department, including, but not limited to, environmental



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insurance, guarantee, performance or other surety bond, letter of credit, qualification as a self-insurer or other demonstration of financial capability. The demonstration of financial capability must be adequate to provide remedies which are protective of human health and the environment should the proposed remedial activity fail.

(4) The application shall include an accurate legal description or survey of the portion of the property where an environmental use control is proposed.

(c) The department shall review the application. If the application is disapproved by the department, the applicant may modify the application in a manner necessary to obtain department approval and resubmit the application for the department's approval. If the application is approved by the department, the department shall provide the applicant a written approval.

(d) An environmental use control pursuant to this act may be approved by the department as part of the remedial activity for the property when residual contamination which exceeds department standards for unrestricted residential use on the subject property.

History: L. 2003, ch. 130, 4; July 1.

65-1,225. Same; recording with register of deeds; enforcement. (a) After an environmental use control has been approved by the department, the owner must register the environmental use control with the register of deeds in the county where the property is located or, if property is owned by the United States or a division thereof, a notice of the environmental use control must be filed with the register of deeds in the county where the property is located. When registering the environmental use control or filing the notice, the following must be included:

(1) A notarized original environmental use control agreement between the applicant and the department; and

(2) An adequate legal description or legal survey of the property which identifies the portion of the property which is subject to the environmental use control.

(b) The applicant must provide to the department a notarized copy of the recorded environmental use control agreement with the register of deeds seal for the property.

(c) Recorded environmental use controls established pursuant to this act shall be enforceable as set forth in K.S.A. 2004 Supp. 65-1,229, and amendments thereto.

History: L. 2003, ch. 130, 5; July 1.

65-1,226. Same; funding requirements; categories of property. (a) Funding needs may be satisfied by department appropriations for property where adequate funding is supplied by federal grants, designated fee funds or other funding sources.

(b) Any funding requirements for an application pursuant to this act, will be based on a one time payment for the property, made by the original applicant.

(c) Funding requirements for other properties will be determined individually and be based on the size of the

property to which the environmental use control applies, toxicity and mobility of the contaminants to which the environmental use control applies, frequency of site inspections and the anticipated inspection costs, as determined by the department.

(1) Category 1 property includes property with the following characteristics: The property is not greater than five acres in size, the residual contamination is characterized by low toxicity and mobility, there is minimal anticipated maintenance of protective structures and the anticipated inspection frequency is once every five years. Category 1 properties would have a one-time payment by the applicant not to exceed \$2,000 to fund the life of the environmental use control.

(2) Category 2 property includes property with the following characteristics: The property may cover areas larger than five acres in size, the residual contamination is characterized by moderate toxicity and mobility, there is limited anticipated maintenance of protective structures and more complicated and/or costly inspections are anticipated, with an inspection frequency of not more than once per year. Category 2 property would have a one-time payment by the applicant not to exceed \$10,000 to fund the life of the environmental use control.

(3) Category 3 property includes property with some or all of the following characteristics: The property may cover a large acreage, the residual contamination is characterized by higher toxicity or mobility, complicated maintenance or monitoring of protective structures is required and frequent or complicated site inspections are anticipated, which may be more frequent than once per year. The inspection cost of category 3 properties is also dependent on the future uses of the property and the maintenance of protective structures by the property owner. For this reason, long term care agreements between the department and the applicant will be required for category 3 properties. These long term care agreements will include a provision to reimburse the department for costs incurred to perform the long term care at the property.

(d) The secretary shall remit to the state treasurer, in accordance with K.S.A. 75-4215, and amendments thereto, all moneys received from fees and long term care reimbursement agreements pursuant to this section. Upon receipt of the remittance, the state treasurer shall deposit the entire amount in the state treasury and credit it to the environmental use control fund.

History: L. 2003, ch. 130, 6; July 1.

65-1,227. Same; term; removal or expiration; modification; liability. (a) An environmental use control may be granted either in perpetuity or for a term of years, as determined by the department. An environmental use control may not be approved for a term of years unless provisions are included that ensures the protection of human health and the environment beyond the expiration of the environmental use control. Upon expiration of the term



if contamination remains above department standards, as set forth in the approved environmental use control, the department can require additional action.

(b) An environmental use control runs with the land and is binding on all successors in interest to property until the environmental use control is removed upon the department's approval or upon expiration of the term of the environmental use control.

(c) An environmental use control shall be removed if the property owner demonstrates to the department's satisfaction that the original risk to human health or the environment which created the need for the control is no longer present. An owner must submit a request to the department for approval to remove all or a portion of the environmental use controls from the property. The department shall review the request and provide the owner with the department's decision to approve or deny the request within 120 days after the department's receipt of the request. If the department denies the request, justification shall be provided to the owner with a written explanation of the denial, which may include that the applicant has not provided the documentation to demonstrate that the request is protective of human health and the environment, as determined by the department.

(d) If the department approves an owner's request to remove all or a portion of environmental use controls, the owner shall file the approval with the register of deeds in the county where the property is located.

(e) An environmental use control may not be extinguished, limited or impaired through adverse possession, abandonment, waiver, lack of enforcement or other common law principles relating to covenants or by the exercise of eminent domain.

(f) An environmental use control may be modified by mutual written agreement by the property owner and the department.

(g) The department shall not acquire any liability by virtue of approving an environmental use control or by approving removal of all or a portion of environmental use controls.

History: L. 2003, ch. 130, 7; July 1.

65-1,228. Same; restrictions or prohibitions. (a) An environmental use control pursuant to this act may restrict or prohibit the activities at or uses of property. The restrictions imposed shall be those agreed to by the applicant and deemed necessary by the department to protect the public from exposures to contaminants which remain at the property.

(b) An environmental use control pursuant to this act may include or require the following:

(1) Prompt notification to the department of any transfer of the property, such notice to be given by the transferor;

(2) prompt notification to the department of any change in use of the property, such notice to be given by the property owner;

(3) maintenance of protective structures or remedial

systems at the property, such as soil caps, soil covers, soil surfaces, berms, drainage structures, vegetation, monitoring wells or other structures or systems;

(4) access to the property by agents of the department as necessary to inspect and monitor remediation activities, monitoring wells, surface streams and protective structures or remedial systems and to ensure implementation and enforcement of the requirements, restrictions and other limitations of the environmental use controls;

(5) any other obligations necessary to reduce or eliminate risks or threats to human health and the environment from the property; or

(6) a one-time payment or long term care agreement to provide funding for environmental use control oversight.

(c) Restrictions, prohibitions and zoning requirements placed on property by a local or state government may be substituted in place of an environmental use control. Such restrictions, prohibitions and zoning requirements may be utilized in addition with any environmental use controls approved by the department. This provision does not grant or expand authority of local government to restrict, prohibit, zone or regulate land.

(d) All interests not limited by the environmental use control shall remain with the owner.

History: L. 2003, ch. 130, 8; July 1.

65-1,229. Same; enforcement. (a) Upon receipt of information that approved environmental use controls are not being implemented in accordance with an approved environmental use control agreement or that property subject to an approved environmental control presents a hazard to human health or the environment, the secretary may take such actions as may be necessary to protect human health or the environment. The action the secretary may take shall include, but not be limited to:

(1) Issuing an order directing the owner of the subject property to take such steps as are necessary to correct any deficiencies and fully implement the approved environmental use controls.

(2) Issuing an order retracting the approval of the remedial action for the subject property, which included the environmental use control as part of the remedy and require the owner of the property to implement remediation of the property to a cleanup standard which will allow for unrestricted use of the property.

(3) For category 3 property as described in subsection (c)(3) of K.S.A. 2004 Supp. 65-1,226, and amendments thereto, commencing an action enjoining acts or practices set forth in the approved environmental use controls or requesting that the attorney general or appropriate district or county attorney commence an action to enjoin such actions which result in approved environmental use controls not being implemented or not being fully or properly implemented or which present substantial and imminent threat or hazard to human health or the environment.

(b) Any order of the secretary pursuant to subsection



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(a)(1) or (a)(2) is subject to hearing and review in accordance with K.S.A. 2004 Supp. 65-1,234, and amendments thereto.

(c) An environmental use control may not be separated from the property and survives foreclosure of a mortgage, lien or other encumbrance, as well as tax sales and the issuance of a tax deed.

History: L. 2003, ch. 130, 9; July 1.

65-1,230. Same; department oversight and tracking. (a) The department shall provide oversight of the environmental use control for property to ensure that the property is being used only for the purposes permitted by the terms of the environmental use control agreement and is not being used in a manner that is prohibited or restricted by the terms of the agreement.

(b) The department shall develop and maintain an environmental use control tracking system on all approved environmental use controls. The tracking system data shall be made available to the public in a manner which allows review by either city or county and shall include the following:

- (1) Name of the property;
- (2) address of the property, including the city and county;
- (3) legal description of the property;
- (4) cause and type of the environmental contamination;
- (5) description of the environmental use control; and
- (6) duration of the environmental use control.

History: L. 2003, ch. 130, 10; July 1.

65-1,231 Environmental use control fund. (a) There is established in the state treasury the environmental use control fund. Moneys from the following sources shall be deposited in the state treasury and credited to the fund:

(1) Moneys collected from the environmental use control one-time payments and long term care agreement reimbursements;

(2) moneys received by the secretary in the form of gifts, grants, reimbursements or appropriations from any source intended to be used for purposes of the fund; and

(3) interest attributable to the investment of moneys in the fund.

(b) Moneys in the environmental use control fund shall be expended only for costs of:

- (1) Review of environmental use control applications;
- (2) oversight of remedial projects which include an environmental use control as an element of their remedy, including inspections, monitoring and tracking of the environmental use control;
- (3) activities performed by the department to address immediate or emergency threats to human health or the

environment related to properties subject to environmental use controls;

(4) development, operation and maintenance of the environmental use control tracking system; and

(5) administration and enforcement of the provisions of this act.

(c) On or before the 10th of each month, the director of accounts and reports shall transfer from the state general fund to the environmental use control fund interest earnings based on:

(1) The average daily balance of moneys in the environmental use control fund for the preceding month; and

(2) the net earnings rate of the pooled money investment portfolio for the preceding month.

(d) All expenditures from the environmental use control fund shall be made in accordance with appropriation acts upon warrants of the director of accounts and reports issued pursuant to vouchers approved by the secretary or the secretary's designee for purposes set forth in this section.

History: L. 2003, ch. 130, 11; July 1.

65-1,232. Rules and regulations. The secretary shall adopt rules and regulations to implement the provisions of this act.

History: L. 2003, ch. 130, 12; July 1.

65-1,233. Publication of approved use controls. The department shall publish annually in the Kansas register a summary of the number of approved environmental use control agreements pursuant to this act.

History: L. 2003, ch. 130, 13; July 1.

65-1,234. Review of agency actions. A person adversely affected by any order or decision of the secretary pursuant to this act, within 15 days after service of the order or decision, may request in writing a hearing. Hearings under this section shall be conducted in accordance with the provisions of the Kansas administrative procedure act. Any action of the secretary pursuant to this section is subject to review in accordance with the act for judicial review and civil enforcement of agency actions.

History: L. 2003, ch. 130, 14; July 1.

65-1,235. Severability. If any provision of this act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this act which can be given effect without the invalid provision or application. To this end the provisions of this act are severable.

History: L. 2003, ch. 130, 15; July 1.